1970

Afroyim v. Rusk: The Evolution, Uncertainty and Implications of a Constitutional Principle

P.Allan Dionisopoulos

Afroyim v. Rusk: The Evolution, Uncertainty and Implications of a Constitutional Principle

P. Allan Dionisopoulos*

I. INTRODUCTION

Only on rare occasions can one expect a decision of the Supreme Court to have an impact outside the United States as well as on the American people. One such case was the desegregation decision of 1954,[1] since that was a promise of a new American commitment to overcome what others described as our national dilemma.[2] It was also foreseeable that the decision would receive a favorable reception within newly-emerging nation-states where racism and notions about racial superiority and inferiority were anathema. Other examples of cases having foreign as well as domestic implications include those which involved questions about Moscow's control over the Russian Orthodox Church in America[3] and those which reflected American antagonism toward economic theories and practices in other political systems.[4] Because such cases have political overtones and affect America's external relationships as well as the rights of Americans, both their international and internal implications are apparent.

While there are several examples of Supreme Court decisions having an external impact, it is doubtful that any created a more complex problem for the United States than *Afroyim v. Rusk*.[5] In that case the Court declared that American citizenship is an absolute constitutional right. Therefore, the Government of the United States may not forcibly deprive an American of his nationality. A decision such as this is bound to be favorably received within libertarian quarters. The question is whether the Supreme Court can continue on a libertarian course on this issue, knowing that its decision has since become a source of embarrassment for the United States in its relationships with the Arab world.[6]

---

* Professor of Political Science, Northern Illinois University.

1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
2. G. MYRDAL, THE AMERICAN DILEMMA (1944).
3. Kreshik v. St. Nicholas Cathedral of North America, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94 (1952).
4. Republic of Cuba v. Flota Maritima, 385 U.S. 837 (1966); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).
5. 387 U.S. 253 (1967).
6. The exact nature of this problem can be better elaborated

The purpose of this article is to determine the meaning and implications of *Afroyim v. Rusk* both within and without the United States. Such an inquiry can be said to be justified by the uniqueness of this decision in American constitutional history. For the first time since 1789 the Supreme Court moved away from the judicial maxim, "rights are only relative," declaring that the right of citizenship is one constitutional right which is absolute. An inquiry into this decision has domestic relevance for still another reason: There are possibly as many as 60,000 young Americans who left the United States during the Vietnamese War in order to escape the draft. While it remains probable that draft evaders will be prosecuted under the Universal Military Training and Service Act,[7] it is also apparent, given the majority opinion in the *Afroyim* case, that involuntary expatriation may not be made a part of their punishment.[8] In addition, the case creates a dilemma. On the one hand, it states a new constitutional principle of significance to so many Americans, including thousands of draft evaders, their families and possibly millions of Americans who may claim dual citizenship,[9] that we may

---

within the text of this article. *See* Part IV *infra*. For the moment it is enough to note that in October, 1969, the governments of ten Arab nations claimed that American "volunteers" were serving in the Israeli armed forces and that the United States did not automatically expatriate these men. It is possible, American spokesmen answered, that men with American and Israeli (dual) citizenship are serving. At least in part the official American position was based on the *Afroyim* decision. In view of that decision the United States may not forcefully expatriate American citizens. *See* New York Times, Oct. 19, 1969, § 1, at 19, col. 1; *id.*, Oct. 21, 1969, at 15, col. 1; *id.*, Oct. 22, 1969, at 6, col. 1.

7. "[A]ny person . . . who otherwise evades or refuses registration or service in the armed forces . . . shall, upon conviction . . . be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . . ." 50 App. U.S.C. § 462(a) (1968). That the draft evader may be punished is claimed by the Supreme Court: "[T]he draft evader who wishes to exercise his citizenship rights will inevitably come home and pay his debt, which within constitutional limits Congress has the power to define." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 185 (1963). Later in this study we will consider whether in fact the draft evader who returns to the United States may be punished. *See* Part IV *infra*. This question is prompted by the Court's ruling in *Afroyim*.

8. 8 U.S.C. § 1481(a)(10) (1964) provides for expatriation of those who leave or remain outside the jurisdiction of the United States in time of war or during a national emergency declared by the President in order not to comply with "any compulsory service laws of the United States."

9. A person born within the jurisdiction of the United States to alien parents may claim American citizenship by reason of *jus soli* (law of place) and the citizenship of his parents on the ground of *jus sanguinis* (law of blood). The United Nations Convention on the Re-

want to honor it and make sure that it is operational. On the other hand, because this ruling unwittingly contributed to the further aggravation of problems in the Middle East and created a situation which Arab governments seized as justification for expanding that conflict,[10] we may properly question whether Congress should be denied the power to prescribe conditions under which American citizens will be expatriated.[11] Americans may yet discover the practicality of a statement by Justice

---

duction of Statelessness acknowledges these two principles whereby citizenship is naturally acquired. 360 U.N.T.S. 117 (1961). States other than the United States similarly acknowledge these two principles.

10. Although the United States announced that it discourages rather than encourages American citizens from serving in foreign armies, it also admitted that such service could not lead to automatic expatriation. New York Times, Oct. 21, 1969, at 15, col. 1. The Israeli Foreign Minister, Abba Eban, admitted that as many as 100 men having American passports were probably serving in the Israeli armed forces. However, he also contended that the Arabs' claim that American "volunteers" were serving Israel was a mere cover-up for the Arabs who were intent upon globalizing the war. *Id.*

That there was reason for concern in Tel Aviv and Washington about how the governments of Arab nations might use the presence of Americans in the Israeli Army as justification for their own use of foreign volunteers was brought to light immediately after the issuance of official statements by the United States and Israel. In Cairo an English language newspaper proposed that the United Arab Republic accept foreign volunteers, especially combat-trained pilots from the Soviet Union, Pakistan, India and the Peoples Republic of China. This was in response to what the Arabs condemned "as United States permission for Americans to serve in Israeli armed forces . . . ." *Id.*, Oct. 22, 1969, at 6, col. 1.

11. That the Court does not permit distinctions between natural-born and naturalized American citizens is shown by both Schneider v. Rusk, 377 U.S. 163 (1964), and Afroyim v. Rusk, 387 U.S. 253 (1967). In the *Schneider* decision the Supreme Court invalidated a statutory distinction between these two categories of citizens. Prior to 1964 a natural-born American citizen could remain outside of the United States for a lifetime and yet not lose his nationality, whereas a naturalized citizen could be deprived of his nationality by residing for three consecutive years in the place of his birth or by residing for five consecutive years outside of the jurisdiction of the United States. McCarran-Walter Act of 1952 § 352, ch. 477, 66 Stat. 163 (1952). The removal of this statutory distinction does not of course affect the constitutional prohibition on a naturalized citizen becoming President or Vice President of the United States. U.S. CONST. art. II, § 1 (4).

Except for residence outside the United States, Congress made no other distinction between natural-born and naturalized citizens. All were equally susceptible to losing their nationality for any of the reasons stated in 8 U.S.C. § 1481(a) (1964). The fact that Afroyim was a naturalized American citizen thus had no special significance in his being told by the Department of State that he had forfeited his American citizenship by voting in the Israeli election of 1951. For the background of his case *see* 387 U.S. at 254.

Frankfurter in *Perez v. Brownell.*[12] There he stated that members of Congress,

> counseled by those on whom they rightly relied for advice, were concerned about actions by citizens in foreign countries that create problems of protection and are inconsistent with American allegiance. Moreover, we cannot ignore the fact that embarrassments in the conduct of foreign relations were of primary concern in the consideration of the Act of 1907, of which the loss of nationality provisions of the 1940 Act are a codification and expansion.[13]

II. INVOLUNTARY EXPATRIATION BEFORE *AFROYIM*—PROGRESSIVE RESTRICTION OF CONGRESSIONAL POWER

The foregoing statement by Justice Frankfurter, which was the majority position in 1958, was in sharp contrast at that time to what Justices Warren, Black and Douglas believed to be the correct constitutional doctrine. Each side had a different conception of the power of Congress with respect to expatriation. These distinctive positions, however, did not mean nonconcurrence on all points; there was general agreement between 1958 and 1967[14] that the powers of government over expatriation had to be curbed. These cases, and others decided between 1946 and 1958, suggested that a new liberal pattern had emerged in the Court's decisions on citizenship questions.[15]

For more than twenty years prior to *Afroyim* the Supreme Court had frustrated government actions in naturalization and expatriation cases.[16] The new era was inaugurated by *Gir-*

12. 356 U.S. 44 (1958).

13. *Id.* at 57-58.

14. There were two other cases decided the same day as Perez v. Brownell. These are Trop v. Dulles, 356 U.S. 86 (1958) and Nichikawa v. Dulles, 356 U.S. 129 (1958). Other relevant cases are Schneider v. Rusk, 377 U.S. 163 (1964) and Kennedy v. Mendoza-Martinez (Rusk v. Cort), 372 U.S. 144 (1963).

15. Savorgnan v. United States, 338 U.S. 491 (1950), stands as an exception to this liberal pattern. In 1940 Mrs. Savorgnan married an Italian consular official. They lived in Italy during the war years. After the war Mrs. Savorgnan claimed American citizenship, denying that it had been her intention to renounce her nationality. Although there was evidence that she had been naturalized in Italy, the Court's decision did not turn upon that. Instead the Court ruled that she had expatriated herself by establishing residence in Italy. Since this decision is an abberation and has by implication been repudiated, we need not further discuss it.

16. To underscore this point we may note that on sixteen occasions since World War II the Court nullified national legislation: United States v. Lovett, 328 U.S. 303 (1946); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); Trop v. Dulles, 356 U.S. 86 (1958); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Schneider v. Rusk, 377 U.S. 163 (1964); Aptheker v. Rusk, 378 U.S. 500 (1964); Lamont v.

ouard v. United States,[17] a decision not apposite to the cases with which this article is primarily concerned, yet one that reflected the new liberal pattern in citizenship cases.[18]

Following the *Girouard* decision came still other cases which revealed the extent to which the Court would limit the power of the national government to expatriate. These cases may be divided into two categories. Within one group are cases which were decided on procedural grounds.[19] They dealt mostly with Americans who could claim dual citizenship and who allegedly acted in such manner as to choose the citizenship of the land of their parents.[20] In another case a citizen, claiming only American nationality, performed a deed that could lead to expatriation.[21] Within the second group are cases in which the Court reached substantive constitutional questions.[22] A further elaboration on these two categories seems required, not only to distinguish between the procedural and substantive grounds upon which these decisions turned, but also to underscore the significant restraints imposed upon governmental power and to trace the pathway of the new constitutional doctrine in *Afroyim*.

Day, 381 U.S. 301 (1965); United States v. Brown, 381 U.S. 437 (1965); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965); Afroyim v. Rusk, 387 U.S. 253 (1967); United States v. Robel, 389 U.S. 258 (1967); Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); United States v. Jackson, 390 U.S. 570 (1968); Leary v. United States, 395 U.S. 6 (1969). Four of these decisions affected the power of the United States to expatriate citizens (*Schneider, Trop, Mendoza-Martinez* and *Afroyim*).

17. 328 U.S. 61 (1946).

18. The *Girouard* decision overturned precedents of more than fifteen years' standing by reinterpreting an oath required of persons being naturalized. On earlier occasions the Court ruled that aliens could be denied citizenship if they refused to swear that they would bear arms in defense of the United States. United States v. MacIntosh, 283 U.S. 605 (1931); United States v. Bland, 283 U.S. 636 (1931); United States v. Schwimmer, 279 U.S. 644 (1929). This oath had its origin in administrative regulations rather than statute.

Although a similar oath provision was incorporated in the McCarran-Walter Act of 1952, Congress provided enough exceptions to conform to the broadest possible interpretation of *Girouard*, 8 U.S.C. § 1448(a) (1964). Moreover, Seeger v. United States, 380 U.S. 163 (1965) states a broad enough rule regarding conscientious objection to overcome any existing deficiencies in the statute.

19. Kennedy v. Mendoza-Martinez (Rusk v. Cort), 372 U.S. 144 (1963); Nishikawa v. Dulles, 356 U.S. 129 (1958); Gonzales v. Landon, 350 U.S. 920 (1955); Mandoli v. Acheson, 344 U.S. 133 (1952); Acheson v. Murata, 342 U.S. 900 (1952); Acheson v. Okimura, 342 U.S. 899 (1952).

20. Cases cited at note 19 *supra*, with the exception of *Cort*.

21. Rusk v. Cort, 372 U.S. 144 (1963). Cort remained outside the United States to avoid military service.

22. Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964); Trop v. Dulles, 356 U.S. 86 (1958).

Prior to *Afroyim v. Rusk* the Court had several opportunities to answer substantive constitutional questions.[23] That it did not do so could suggest that the Court wanted to remain faithful to its self-imposed guidelines for exercising judicial power.[24] Or it may not have been possible for enough members to reach an opinion on the constitutional questions, forcing the justices to find other grounds for disposing of these cases.

Rules of evidence and burden of proof were set by the Court as important procedural requirements in the several dual nationality cases.[25] Some Americans, whose claim to dual nationality derived from the two principles *jus soli* ("the law of place") and *jus sanguinis* ("the law of blood"), faced the possibility of loss of United States citizenship because of certain actions on their part. For example, a person born within the United States to alien parents may have been taken as a child to the fatherland. Or this person, after graduating from college, may have returned to the native land of his parents to study. The first was the situation experienced by Mandoli;[26] the second was the case of Mitsugi Nishikawa.[27]

In each instance circumstances beyond the control of the individual made it impossible for him to return to the United States. And in each case the individual was compelled to enter the armed forces of the nation in which he was then residing.[28]

---

23. For example, having disposed of *Kennedy v. Mendoza-Martinez* and *Rusk v. Cort* on procedural grounds, the majority stated that this made it unnecessary "to determine whether these sections [of the statute] are otherwise within the powers of Congress." 372 U.S. 144, 186 n.43 (1963).

24. In Ashwander v. TVA, 297 U.S. 288 (1936), Justice Brandeis identified seven such guidelines. For our purposes two of these are pertinent. The Court will (1) answer the constitutional question only if the need arises and (2) formulate the narrowest possible constitutional rule.

25. *E.g.*, Nishikawa v. Dulles, 356 U.S. 129 (1958); Mandoli v. Acheson, 344 U.S. 133 (1952); Acheson v. Murata, 342 U.S. 900 (1952); Acheson v. Okimura, 342 U.S. 899 (1952).

26. Mandoli v. Acheson, 344 U.S. 133 (1952).

27. Nishikawa v. Dulles, 356 U.S. 129 (1958).

28. It seems not unreasonable to say that compulsion is present under the laws of any state, not just one having a totalitarian form of government. As long as the individual is recognized as a citizen of that state, he must perform either military service or whatever alternate noncombatant service is permissible under the law. That leniency is not much more apparent in a nontotalitarian system is evident in the report that "about 6000 [American] objectors—most of them Jehovah's Witnesses—were convicted and sentenced to prison between 1940 and 1947 . . . ." C. JACOBS & J. GALLAGHER, THE SELECTIVE SERVICE ACT: A CASE STUDY OF THE GOVERNMENTAL PROCESS 25 (1967).

Even the Attorney General of the United States admitted in the *Mandoli* case that the "choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all."[29] As long as the Government acknowledged the difficulties confronting the young man of draft age who resided within the jurisdiction of a state which claimed him as a national, there was no apparent ground for declaring that he expatriated himself by entering the armed forces of a foreign state.[30] There was, of course, as in the *Mandoli* case, the possibility that the United States would declare that a dual national's prolonged sojourn elsewhere signified his selecting the nationality of that other state. Or, even after acknowledging the difficulties of trying to exercise an option in refusing military service to a totalitarian government, the United States might still argue that the dual national had voluntarily performed the act and should therefore lose his American citizenship. Such an argument was not acceptable to the Supreme Court. Noting the dire consequences of expatriation, the Court declared in *Nishikawa v. Dulles* that the government must bear "the burden of persuading the trier of fact by clear, convincing and unequivocal evidence that the act showing renunciation of citizenship was voluntarily performed."[31]

Since it was virtually impossible for the United States to prove that enlistment in a foreign army was voluntary and not a consequence of duress and threats, there was not much prospect of the Government's succeeding in expatriating these men. The guidelines established in *Mandoli*, *Nishikawa* and the other dual citizenship cases[32] made it unlikely that the United States could prove that the act of an individual had been performed voluntarily.

Even in the event that voluntarism could be proved, there was the possibility that the Government would not be permitted to deprive a person of his American citizenship. In part this could be attributed to still other procedural requirements imposed by the Supreme Court in *Kennedy v. Mendoza-Martinez* (*Rusk v. Cort*),[33] a decision in which a statutory provision was

29. Mandoli v. Acheson, 344 U.S. 133, 135 (1952).

30. The relevant portion of the law provided for loss of nationality by an American citizen who enters or serves in "the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense . . . ." 8 U.S.C. § 1481(a)(3) (1964).

31. 356 U.S. 129, 135 (1958).

32. *See* note 26 *supra*.

33. 372 U.S. 144 (1963).

nullified; and in part it stemmed from the Court's reaching substantive constitutional questions in *Trop v. Dulles*[34] and *Schneider v. Rusk*.[35] The significance of these several rulings can be underscored by contrasting them to *Perez v. Brownell*,[36] the one notable victory for the Government in expatriation proceedings between 1958 and 1967.

On the procedural side the *Perez* case was distinguishable from both *Nishikawa* and *Mendoza-Martinez*. The burden of proof requirement and the question of voluntarism had been present in *Nishikawa*, whereas in *Mendoza-Martinez* the Court required that the procedural safeguards of the fifth and sixth amendments be made available to anyone against whom an expatriation proceeding had been initiated. Neither of these sets of requirements was operational in *Perez*.

Proving voluntarism and bearing the burden of proof were not problems for the United States in the *Perez* case. In both administrative and judicial proceedings it was established that Perez had remained outside of the United States as a draft evader and that he had voted in a political election in Mexico in 1946. Moreover, in several instances Perez had formally declared to United States authorities that he was a Mexican national. Yet, on other occasions, he claimed American citizenship by reason of his birth in Texas.

Perez had been taken to Mexico as a child in 1919 or 1920. In 1943 he applied for entry into the United States as a railway laborer. At that time he claimed to be a native-born Mexican national. He spent more time in the United States in 1944. In 1947 Perez sought to enter the United States, now claiming that he was a native-born American national. During administrative proceedings before immigration authorities he admitted to having remained outside of the United States to avoid the draft and to having voted in the 1946 political elections in Mexico. These two actions were defined by statute as grounds for losing one's citizenship.[37] An order declaring that Perez had expatriated himself was sustained by the Board of Immigration Appeals.[38]

In 1952 Perez returned to the United States as an alien farm

34. 356 U.S. 86 (1958).
35. 377 U.S. 163 (1964).
36. 356 U.S. 44 (1958).
37. Nationality Act of 1940, ch. 876, §§ 401(e) & (g), 54 Stat. 1137, *as amended*, 58 Stat. 746. Similar provisions were incorporated in the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1481(a)(5) & (10) (1964).
38. Perez v. Brownell, 356 U.S. 44, 46 (1958).

worker. At the time that he obtained a permit to enter the United States, he asserted that he was a native-born citizen of Mexico. However, in 1953, when he surrendered to immigration authorities in California "as an alien unlawfully in the United States," he again "claimed the right to remain by virtue of his American citizenship."[39] Perez' claim to citizenship was rejected in still another administrative hearing, a judgment which was again sustained by the Board of Immigration Appeals. He then commenced a suit in a federal district court "for a judgment declaring him to be a national of the United States."[40] That court determined that Perez had remained outside the United States to avoid military service and that he had voted in a foreign political election. These were grounds, the court announced, for declaring that Perez had expatriated himself. Thereafter appeals were taken to the circuit court of appeals and to the Supreme Court, both of which sustained the prior administrative and judicial declarations that Perez lost his nationality by reason of his conduct.[41]

Perez' conduct was no more serious than that of Nishikawa, who not only was away from the United States during World War II but actually served in the Army of Japan while these two powers were at war with each other. Nor did his offense seem to be greater than Trop's, who had been found guilty by a court martial of deserting in time of war.[42] Mendoza-Martinez, a dual national, and Cort had committed the same offense as Perez in that all three remained outside of the United States to avoid the draft. Since Nishikawa and Trop won their cases on the same day that Perez lost his,[43] and since Mendoza-Martinez and Cort were sustained in their respective claims to American citizenship,[44] there were obviously distinguishing factors in these several cases.

The issue in *Nishikawa* could indeed be described as more serious than that in *Perez v. Brownell.* Nishikawa not only re-

39. *Id.* at 47.
40. *Id.*
41. *Id.* at 62.
42. Trop v. Dulles, 356 U.S. 86 (1958). Section 401(g) of the Nationality Act of 1940 prescribed loss of citizenship as a part of the punishment for anyone convicted by court martial for desertion in time of war, ch. 876, 54 Stat. 1168, 1169. A similar provision was included in the McCarran-Walter Act of 1952, 8 U.S.C. § 1481(a)(8) (1964).
43. Nishikawa v. Dulles, 356 U.S. 129 (1958); Trop v. Dulles, 356 U.S. 86 (1958).
44. Kennedy v. Mendoza-Martinez (Rusk v. Cort), 372 U.S. 144 (1963).

mained outside of the United States but served in the Japanese Army during World War II. That Nishikawa was not deprived of his citizenship can be attributed to the procedural guidelines set down in this and preceding cases.[45] Since the United States could not prove to the Court's satisfaction that Nishikawa acted voluntarily rather than under compulsion, the procedural requirement of burden of proof had not been met. The same procedural problem was not present in *Perez*, it having been established in prior administrative and judicial proceedings that the appellant had acted voluntarily.[46]

Perez was also distinguishable from *Trop*, although on substantive rather than procedural grounds. Each appellant challenged the validity of legislation under which the Government declared that he had lost his citizenship. Perez requested that the Court invalidate the two provisions of the Nationality Act (voting in a foreign election and remaining outside of the United States to avoid military service) which were the statutory bases for prior administrative and judicial rulings against him.[47] Trop questioned the validity of the provision which made loss of citizenship a part of the punishment for anyone found guilty of desertion in time of war.[48]

In deciding against Perez the five-man majority directed its attention only to that provision which stipulated loss of nationality for those Americans who vote in foreign elections.[49] Congress must have the authority, the Court contended, to prevent actions by individuals embarrassing to the United States in the conduct of foreign relations. "The importance and extreme delicacy of the matters here sought to be regulated," Justice Frankfurter asserted,

> demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose. The critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government . . . .[50]

Having determined that Congress may make loss of nationality a

45. *E.g.*, Mandoli v. Acheson, 344 U.S. 133 (1952); Acheson v. Murata, 342 U.S. 900 (1952); Acheson v. Okimura, 342 U.S. 899 (1952).

46. 356 U.S. 44, 46 (1958).

47. *Id.* at 45.

48. *See* note 42 *supra.*

49. An American shall lose his nationality by voting "in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory." Nationality Act of 1940, ch. 876, § 401(e), 54 Stat. 1137.

50. Perez v. Brownell, 356 U.S. 44, 60 (1958).

consequence of voting in a foreign election, the Court saw no need to decide the constitutionality of the other statutory provision pertaining to draft evasion.[51]

Justice Brennan was the mobile member of the Court that day, voting with one group of four justices to provide a majority against Perez and with the others (Warren, Black, Douglas and Whittaker) to provide a majority against the Government in the *Trop* case. There was no question in Justice Brennan's mind about the power of Congress to prescribe loss of nationality as a consequence of voting in a foreign election. However, in *Trop* he stated that expatriating "the wartime deserter who is dishonorably discharged after conviction by court-martial, lies beyond Congress' power to enact."[52] There was a rational connection between making loss of nationality the penalty for voting in a foreign election and preventing an individual from embarrassing the United States in foreign affairs. No similar rational connection could be offered for making loss of citizenship a part of the penalty for deserting in time of war.[53]

A judgment of the Court rather than an opinion was reached in *Trop*. For that reason *Trop* did not appear to be definitive as an answer to the constitutional question. *Trop* and *Perez* did, however, reveal a narrow division on the Court over two key issues. First, may Congress enact any legislation, defining the conditions under which an American will lose his nationality? Second, if Congress does possess such power, does its authority extend to all circumstances and conditions which are legislatively defined? A negative answer to the first question would, of course, have made unnecessary any consideration of the second.

Had Chief Justice Warren alone been responsible for deciding *Perez* and *Trop*, he would have answered the first question in the negative. "In *Perez v. Brownell*," the Chief Justice said in *Trop*,

> I expressed the principles that I believe govern the constitutional status of United States citizenship. It is my conviction that citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers.[54]

Unable to win majority support for this constitutional principle in either *Perez* or *Trop*, Chief Justice Warren was necessarily forced to go along with others who contended that the power to

51. *Id.* at 62.
52. Trop v. Dulles, 356 U.S. 86, 105 (1958).
53. *Id.* at 105-07.
54. *Id.* at 91-92.

expatriate does lie with the Government although it is a power which is subject to limitations.

The nature of such limitations was revealed initially in *Trop v. Dulles*[55] and later in *Kennedy v. Mendoza-Martinez*[56] and *Schneider v. Rusk*.[57] Like Perez, Mendoza-Martinez was a dual citizen. He was born in the United States and thus acquired American citizenship by reason of *jus soli*. Because of his parentage, he also was a Mexican citizen under Mexican law through *jus sanguinis*.[58] In this and a companion case, *Rusk v. Cort*,[59] the appellees requested that the Supreme Court nullify that section of the law whereby they were held to be expatriated for leaving or remaining outside of the United States to avoid military service.[60] As in the *Perez* case there was no difficulty on the part of the Government in proving that these had been voluntary acts. Again, as in *Perez*, the Court was asked to void legislation on the ground that its enactment had been beyond the constitutional authority of Congress. Although the Court did look into the constitutional issues, it went no further than to declare that the pertinent sections were void, "lacking as they do the procedural safeguards which the Constitution demands."[61] There could be no question that denationalization is a form of punishment, Justice Goldberg announced. Therefore, since these provisions of the law were of a penal nature, the procedural safeguards of the fifth and sixth amendments had to be made available.[62] Having held that the two sections were constitutionally defective on procedural grounds the majority saw no need to answer the further substantive question "whether these sections are otherwise within the powers of Congress."[63]

In *Schneider v. Rusk*[64] the Court did direct its attention to a

55. As previously noted, the Court was faced with the question of the constitutionality of section 401(g) of the Nationality Act of 1940, which included expatriation as part of the punishment for desertion in time of war. This provision was declared null and void. *Id.* at 104.

56. 372 U.S. 144 (1963).

57. 377 U.S. 163 (1964).

58. 372 U.S. 144, 147 (1963).

59. *Id.* at 149.

60. The pertinent section in the case of *Mendoza-Martinez* was 401(g) of the Nationality Act of 1940, ch. 876, 58 Stat. 746. This was superseded by section 349(a)(10) of the McCarran-Walter Act of 1952, 8 U.S.C. § 1481(a)(10) (1964).

61. Kennedy v. Mendoza-Martinez (Rusk v. Cort), 372 U.S. 144, 186 (1963).

62. *Id.* at 186 n.43. *See also* the discussion about the fifth and sixth amendments and their relevancy to these cases. *Id.* at 164.

63. *Id.* at 186 n.43.

64. 377 U.S. 163 (1964).

substantive constitutional question. On that occasion it undermined a historic statutory distinction between natural-born and naturalized citizens. One such distinction was introduced by the Constitution itself.[65] Another was devised by Congress.[66] Although the Supreme Court was scarcely in a position to deplore the constitutional prohibition against naturalized citizens' election to the Presidency or Vice Presidency, individual judges could and did condemn the statutory distinction between natural-born and naturalized citizens.[67] Implicit in this statutory distinction, declared Justice Douglas, is an "impermissible assumption" that as a class naturalized citizens neither bear the same degree of allegiance to the United States nor are as reliable as natural-born American citizens.[68] Because of this assumption and the statutory distinction, natural-born American citizens were permitted to retain their nationality even though they remained for a lifetime outside the jurisdiction of the United States. On the other hand, naturalized citizens were limited by legislation as to the amount of time they could remain away from America.[69]

Schneider eliminated the statutory restrictions on overseas residence for naturalized citizens. Mrs. Schneider, who immigrated from Germany as a child, acquired American citizenship at the time her parents were naturalized. Having established residence with her husband in West Germany and being outside of the United States longer than permitted by statute, Mrs. Schneider was deprived of her American citizenship. In rendering a decision in her favor Justice Douglas said, "We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the 'natural born' citizen is eligible to be President."[70]

65. "No person except a natural born citizen . . . shall be eligible to the Office of President . . . ." U.S. CONST. art. II, § 1(4).

66. Under the McCarran-Walter Act of 1952 a naturalized citizen lost his citizenship by "(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated . . . . (2) having a continuous residence for five years in any other foreign state or states. . . ." Certain exceptions were made for American veterans, persons engaged in religious, charitable or educational work, or the employee of a firm which had its principal office in the United States, ch. 477, §§ 352-354, 66 Stat. 183.

67. *See, e.g.,* the arguments of Justice Rutledge in Klaprott v. United States, 335 U.S. 601 (1949) and Knauer v. United States, 328 U.S. 654 (1946).

68. Schneider v. Rusk, 377 U.S. 163, 168 (1964).

69. *Id.*

70. *Id.* at 165.

Since these rights "are of the same dignity and are coextensive," the principle of equal protection of the laws had to be applied.[71]

For the third time in the period 1958 to 1964 the Court had nullified a portion of the national law pertaining to the loss of nationality. These were, of course, no more than continuing acknowledgments that Congress may define, within limits, the conditions under which an American can be deprived of his citizenship. And as late as the *Schneider* decision in 1964 there was not even a hint of majority support for the new constitutional principle which was to emerge in *Afroyim v. Rusk*.[72]

III. *AFROYIM v. RUSK*—AN ABSOLUTE RIGHT OF CITIZENSHIP

Afroyim was within the postwar liberal pattern of Court decisions in expatriation cases. But it was exceptional in that it withdrew entirely from the national government the power to forcibly expatriate American citizens. Even the matter of voting in a foreign political election, with its likely embarrassing international consequences for the United States, was no longer a justifiable reason for validiating a portion of the law.

Beys Afroyim, an immigrant who had been naturalized in 1926, went to Israel evidently for the purpose of taking up residence. Moreover, by voting in the Israeli election of 1951 he apparently intended to acquire the citizenship of the new republic.[73] In 1960 Afroyim's request for a renewal of his American passport was denied by the State Department on the ground that he violated that section of the law[74] sustained in *Perez v. Brownell*.[75]

71. *Id.* The fact that the equal protection clause of the fourteenth amendment is applicable only to state governments was not a worrisome or insurmountable problem for the Supreme Court. Using the same tactic that it had employed in declaring unconstitutional the segregated public school system of the District of Columbia, the Supreme Court nullified the unequal treatment accorded naturalized citizens. In the school desegregation decisions the Supreme Court had to treat separately those cases originating in the states and one arising from the District of Columbia. Because *Bolling v. Sharpe* involved segregation in the public schools of the District, it could not be decided by reference to the equal protection clause of the fourteenth amendment. The Court thus used the due process clause of the fifth amendment, declaring that this provision forbade discrimination that is "so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

72. 387 U.S. 253 (1967).

73. *Id.* at 254.

74. In the *Perez* case the statutory provision prescribing loss of nationality for voting in foreign political elections was section 401(e) of

He then sought a declaration that the statute under which his citizenship was revoked was an unconstitutional violation of due process. This plea was rejected by both the district court and the Second Circuit, which upheld the traditional view expressed in *Perez*. On appeal to the United States Supreme Court, however, Afroyim's arguments prevailed. Writing for the majority, Justice Black rejected the theory espoused in *Perez* that

> Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. . . . In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.[76]

By the narrow margin of five to four the Court had repudiated the precedent of *Perez*, denied to Congress *any* power to expatriate an American and subscribed to a principle espoused by Warren in his dissenting opinion almost a decade earlier.[77]

This new constitutional doctrine could claim as one point of origin a statement by the dissenters in *Perez v. Brownell*. "Citizenship *is* man's basic right," declared the Chief Justice, "for it is nothing less than the right to have rights."[78] An important declaration in itself, this statement had even greater significance as a legal premise underlying a revolutionary constitutional doctrine;[79] unlike other constitutional rights, even those of the first

---

the Nationality Act of 1940, ch. 876, 54 Stat. 1137. This section was incorporated in the McCarran-Walter Act, 8 U.S.C. § 1481(a)(5) (1964).

75. 356 U.S. 44 (1958).

76. 387 U.S. at 257.

77. Perez v. Brownell, 356 U.S. 44, 65 (1958).

78. *Id.* at 64.

79. Obviously Professors Mason and Beaney would not agree with my characterizing this as a revolutionary constitutional doctrine. With respect to *Afroyim v. Rusk* they stated, "The Court returned to the American way, May 29, 1967, over-ruling the ten-year old *Perez* decision." A. MASON & W. BEANEY, AMERICAN CONSTITUTIONAL LAW: INTRODUCTORY ESSAYS AND SELECTED CASES 507 (4th ed. 1968). What this "American way" is remains in doubt. If Mason and Beaney mean by this that an individual has a right to expatriate himself, none of the decisions from *Perez* to *Afroyim* affected the "American way." If, on the other hand, it is meant to imply that only recently had forcible expatriation been provided in statutes which were sustained by the Court, we have only to consider the historical record to provide a refutation. As early as the Civil War, Congress included loss of citizenship as part of the penalty for desertion or for leaving the United States "to avoid any draft into the military or naval service, duly ordered . . . ." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 170-71 (1963). *Perez* and other more recent decisions cannot be treated as aberrations, the Court having previously upheld legislation depriving Americans of their citizenship. Mackenzie v. Hare, 239 U.S. 299 (1915).

amendment, the right to American citizenship is absolute and may in no manner be abridged by government. Whether the Supreme Court will adhere to this new doctrine is open to speculation. It now seems quite likely that the Government will want the Court to reconsider *Afroyim* and to bring the right of citizenship within the compass of that judicial maxim which long operated for other constitutional rights: Rights are only relative; therefore their exercise and enjoyment may be affected by government.[80]

IV. IMPLICATIONS AND FUTURE VITALITY OF *AFROYIM*

We have traced the evolution of the constitutional principle of an absolute right of citizenship from the dissenting opinion in *Perez* to the majority opinion in *Afroyim* and have raised the question of its durability. Whether it survives as an operational doctrine is speculative. And yet there are various matters which should be discussed and which might help us to predict the future of the new doctrine. The first factor is the changed composition of the Court. Secondly, there is a question which must be examined in light of a claim made by the Court prior to *Afroyim*. Finally, we must examine the decision in *Afroyim* against the background of recent international developments.

In raising doubt about the durability of this new constitutional principle it is imperative to consider how changes in membership on the Court might produce a reversal of *Afroyim* in the future. Only six of the nine justices who were on the Court at the time *Afroyim* was decided—three from the majority and three dissenters—are still there. The one dissenter who left, Justice Clark, was replaced by Thurgood Marshall. Justice Marshall's identification with the Court's libertarian bloc in civil liberties cases might be taken as an indication that he would vote for, rather than against, the new doctrine. That still means that as presently constituted there are only four votes for continuing the *Afroyim* ruling. Operating on that assumption we may conclude that the balance of power will thus be with President Nixon's appointees. That they are his appointees and that his administration might seek a reversal of *Afroyim* are not the most likely reasons why that decision might be overturned. It is much more likely that Mr. Nixon's appointees might vote for reversal

80. For a discussion about this maxim and the contrary arguments of absolutists *see* C. PRITCHETT, THE AMERICAN CONSTITUTION 383-96 (1959).

because of possible American experiences under this doctrine and its already demonstrated impact on international relations.

Externally the impact has been demonstrated by the angry comments of the governments of Arab states against American "volunteers" in the Israeli armed forces. Internally the experiences are still unknown. Nevertheless, it is possible to speculate, especially by focusing our attention upon the factor of voluntarism and how it might affect the Court's thinking in the future.

The element of voluntarism was introduced in comments by Justices Warren and Black. In *Perez v. Brownell*, Chief Justice Warren stated, "There is no question that citizenship may be voluntarily relinquished."[81] Similarly Justice Black declared in *Afroyim*, "Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."[82] Thus defined, the voluntary act might be regarded as leading to a definitive status, expatriation for the individual. Expatriation is not, however, final, as is shown by *Afroyim*. At all times the decision as to one's nationality remains with the individual. Consequently, Americans are now in the unique position of being able to turn citizenship on and off as easily as they operate a water tap.

Beys Afroyim voluntarily performed an act, voting in a foreign political election, which was both evidence of self-denationalization and one of the statutory grounds for loss of nationality.[83] Similarly, in other cases we have discussed, *Perez v. Brownell*,[84] *Kennedy v. Mendoza-Martinez*[85] and *Rusk v. Cort*,[86] young Americans had voluntarily left or remained outside of the United States to avoid military service. Having performed acts which thus signified expatriation, these Americans nevertheless later sought recovery of their citizenship. Now that the right to citizenship has been judicially defined as absolute, it is not necessary for the individual to do anything to recover his citizenship other than to assert his claim to it. Yesterday's voluntary act of renouncing citizenship might well become today's voluntary act of repatriation.

---

81. 356 U.S. 44, 66 (1958).
82. 387 U.S. 253, 268 (1967).
83. There are ten separate provisions describing acts which lead to loss of nationality in the statute. 8 U.S.C. § 1481(a)(1)-(10) (1964).
84. 356 U.S. 44 (1958).
85. 372 U.S. 144 (1963).
86. *Id.*

Since this factor of voluntarism thus works in both directions and the decision to expatriate may be reversed by the individual himself, there is no role for government. The question could then become whether government may at least punish the draft evader. Because the matter of punishment is one of central importance, especially in determining possible American experiences under the new constitutional doctrine, we should consider a statement by the majority in *Kennedy v. Mendoza-Martinez*[87] against the background of *Afroyim*.

In *Mendoza-Martinez*, Justice Goldberg said,

> Since the substantial benefits of American citizenship only come into play upon return to face prosecution, the draft evader who wishes to exercise his citizenship rights will inevitably come home and pay his debt, which within constitutional limits Congress has the power to define.[88]

No doubt the draft evader could have been punished before 1967. Whether he may now be punished is subject to doubt.

If a draft-eligible person leaves the United States announcing to others that he is moving to avoid military service, the Government would have little trouble proving that such was his purpose. Suppose, however, that the individual makes no announcement at all, or that he states that he is leaving the United States for the purpose of acquiring citizenship elsewhere. As in the case of Beys Afroyim, this would have to be deigned as an act of expatriation performed in good faith. And just as the individual may voluntarily relinquish his American citizenship, so may he voluntarily recover it at some later date. There might be indications that his leaving was prompted by the possibility of his being called to military service. Such an indication would be even stronger were he to return to the United States after the national emergency had passed and there was no longer the likelihood of his being drafted. However, coincidental events could not in themselves prove that his original act of expatriation had not been performed in good faith.

Whether the draft evader may thus avoid punishment will probably depend upon whether the Government is able to prove by his words rather than his deeds that his in fact was not a good faith act of expatriation. The possibility of his escaping punishment also might depend upon his being able to draw an analogy between his case and the case of the American expatriate who votes in a foreign political election and then reclaims citi-

87. 372 U.S. 144 (1963).
88. *Id.* at 185.

zenship. In developing this analogy he might proceed from the factor of voluntarism, noting that the voluntary act is self-reversible. A second element is that at all times determination of one's nationality resides with the individual himself rather than with the Government. From these points he might then move to the conclusion that any act of expatriation must be regarded as having been performed in good faith; therefore, he may not be punished for what he did from the moment he chose to expatriate himself until he recovered his citizenship.

An analogy of this nature is not far-fetched and seems appropriate in view of *Afroyim v. Rusk*. Beys Afroyim did vote in a foreign political election, something once considered in statute[89] and court decision as a source of embarrassment to the United States in the conduct of foreign relations.[90] Afroyim might have embarrassed the United States by voting in the Israeli elections of 1951; however, he could not be punished for that act after reclaiming American citizenship. Similarly, the American who leaves the United States ostensibly to acquire citizenship elsewhere may in fact be avoiding military service; and the American Jew who goes to Israel to aid in her development and defense in fact may have become a source of embarrassment to the United States in its relations with the governments of Arab states. Whether either should be punished for his conduct, whereas Afroyim could not be, is thus open to question. Because of the voluntary nature of expatriation and repatriation and the assumption that each act is performed in good faith, there is doubt as to whether the draft evader or the American who serves in another state's military forces is subject to punishment.

Our internal experiences, such as discovering that the draft evader may not be punished, could be one reason for the Court to reject the *Afroyim* doctrine. The coincidental events of his leaving and remaining outside of the United States during a period of national emergency might be no more than suggestive of a young American's employing a subterfuge rather than performing in good faith an act of expatriation. We might well imagine the political pressures which would build were that suggestion to be strengthened by the return of thousands of young Americans after our Vietnamese adventure has ended. This would smack too much of sharing in the fruits of citizenship but being unwilling to bear its responsibilities. For members of the Court who had not previously expressed themselves in favor of *Afroyim*

89. 8 U.S.C. § 1481(a)(5) (1964).
90. Perez v. Brownell, 356 U.S. 44, 57 (1958).

v. Rusk, it would be a relatively easy matter to vote for reversal rather than accepting the arguments of Justices Warren and Black.

Whatever the nature of our internal experiences under the new constitutional doctrine, we cannot doubt its impact on international relations. The possibility that Amerians might act in such manner as to embarrass their Government in the conduct of foreign relations had previously been seen as justifying forcible expatriation. For example, the prohibition on voting in foreign political elections was dictated by a specific experience. "It seems clear," noted Justice Frankfurter, "that the most immediate impulse for the entire voting provision was the participation by many naturalized Americans in the plebiscite to determine sovereignty over the Saar in January 1935."[91] Were there to be other such plebiscites to decide which nation shall have sovereignty over a disputed area and were naturalized citizens or Amerians having dual citizenship to participate, there would be obvious embarrassment for the United States.

No less embarrassing to the United States is the situation in which it now finds itself in the Middle East. Embarrassment to the United States is merely one of the problems stemming from *Afroyim*. Even more serious is the possibility that the explosive situation in the Middle East will take on broader dimensions as a consequence of Arab governments' enlisting "volunteers" to counter the American "volunteers" in the armed forces of Israel. Both of these points, embarrassment to the United States and further aggravation of the Middle Eastern conflict, should be kept in mind as we consider how international politics might force the Court to reverse *Afroyim*.

At the very moment that the Arab states were complaining to both the United States and the United Nations about Americans serving in the Israeli Army without losing their citizenship, there was a news item from Tel Aviv about an American-born Israeli soldier who was killed during a training exercise.[92] There was still more evidence of the presence of Americans in the armed forces of Israel. The Israeli Foreign Minister, Abba Eban, reported that possibly 80 to 100 men in the Israeli Army hold American passports.[93] The United States is hardly in a position to deny such reports. The question then is whether it can convince Arab governments that it does not condone and that, in

91. *Id.* at 54.
92. New York Times, Oct. 19, 1969, § 1, at 19, col. 1.
93. *Id.*, Oct. 21, 1969, at 15, col. 1.

fact, the United States actively discourages American citizens from serving in foreign armies. And, of course, the United States must also try to convince the Arabs that it is not possible to forcibly expatriate Americans in view of *Afroyim*.

Whether the United States can convince the Arab states that its hands are tied on the expatriation issue depends in no small part on whether the Arab states view the power to denationalize as an attribute of sovereignty. In *Afroyim*, Justice Black said that this power cannot "be sustained as an implied attribute of sovereignty possessed by all nations."[94] Some nations might claim this as part of their sovereign prerogatives; however, within the United States "the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."[95] Failing in their effort to convince the Arab states that the United States is powerless to act, American spokesmen will then have to resort to other arguments to prove that there is no collusion between the American and Israeli governments.

In one confrontation with diplomatic representatives from ten Arab states, Joseph J. Sisco, Assistant Secretary of State for Near Eastern and South Asian Affairs, offered a four-point denial to charges that the United States was virtually a belligerent by reason of permitting its citizens to serve in the Israeli Army: (1) there are no United States military personnel in any capacity in the armed forces of Israel; (2) the United States discourages Americans from serving in foreign military forces; (3) while it is probable that Americans are serving in the Israeli Army, there is also the strong probability that still others are enrolled in Arab armed forces, and (4) United States diplomatic and consular officials actively intervene to prevent the induction of American citizens who are dual nationals into foreign military service.[96]

One problem suggested by the situation in which Americans serve in foreign armies is treatment of prisoners of war and negotiations for their release. If an American serving in the Israeli Army is captured by Egyptian forces and detained as a prisoner of war, may the United States intervene in his behalf? The United States has an obligation to serve its citizens who are outside of its jurisdiction, although there might be circumstances under which it "may, by proper refusal to exercise its largely

94. Afroyim v. Rusk, 387 U.S. 253, 257 (1967).
95. *Id.*
96. New York Times, Oct. 21, 1969, at 15, col. 1.

discretionary power to afford him diplomatic protection, decline to invoke its sovereign power on his behalf."[97] If the United States were to seek negotiations for the purpose of obtaining the release of a prisoner of war, it would simultaneously acknowledge his conduct in creating this situation and its own responsibility for serving American nationals outside of its jurisdiction. Both its own obligations and humanitarian considerations might induce the United States to act in behalf of this man who has only an ill-defined national status. But in acting as though the prisoner of war was in fact its own citizen and not an expatriate, the United States might invite further criticism and enhance the possibility that the Arab states would put into effect the retaliatory program which had been suggested.

Should the governments of Arab states remain unconvinced that the United States lacks the power to deprive an American of his citizenship, they will find ample justification for a plan of recruiting foreign "volunteers," especially combat-trained pilots. Such a suggestion had been made in response to what the Arabs condemned "as United States permission for Americans to serve in Israel armed forces . . . ."[98] Even before this suggestion was publicized, Foreign Minister Eban of Israel spoke of the implications of Arab charges and the possibility of their globalizing the war. The current charges, Eban declared, are in the same vein as the story which the Arabs circulated during the six-day war in 1967, that American and British air strikes against Arab military installations had made possible the success of Israeli arms. At the time that story was circulated, Eban declared, there was every indication that the Arab governments wanted to "globalize the war." Now, with the charges about Americans serving in the Israeli armed forces, there was every indication that the Arabs intended to use this as justification for having Soviet military advisers in Egyptian combat forces.[99]

V. CONCLUSION

Since the United States has actively involved itself in trying to defuse the Middle East and has given every indication of a sincere wish to see that conflict terminate, we can certainly assume that it also would not want to see the war enlarged. Whether it succeeds obviously depends upon how effectively it

97. Kennedy v. Mendoza-Martinez (Rusk v. Cort), 372 U.S. 144, 185 (1963).
98. New York Times, Oct. 22, 1969, at 6, col. 1.
99. *Id.*, Oct. 21, 1969, at 15, col. 1.

can work with other major powers in obtaining a resolution of problems in that area. But the United States must also now be concerned with how an issue originally thought to be of importance only internally, has taken on such broad international implications.

We can readily agree that the rights of Americans are too important to leave their definition, protection and even existence to the vagaries of international politics. Not many Americans would argue that the rights and liberties of a people within any political system should operate only if they do not have an impact on international relations. We are faced, however, with a problem which is too critical to permit us to disregard the international implications. We accepted the maxim, "rights are only relative," in justifying the imposition of restraints upon the exercise of rights within the United States for so long that we must now decide whether that same maxim should not operate with respect to the right of citizenship as well. If within the United States one's rights must be considered in relation to the rights of others and to the legitimate interests of society, certainly the larger interests of the American people's not becoming involved in a hostile international situation is an equally sound justification for reversing *Afroyim* and rejecting the new constitutional principle.